STATE OF MICHIGAN

COURT OF APPEALS

BONNIE S. WEISS,

Plaintiff-Appellant,

v

EATON COUNTY ROAD COMMISSION and ADVANCED PAVING COMPANY,

Defendants-Appellees.

UNPUBLISHED
November 19, 1999

No. 210105
Eaton Circuit Court
LC No. 97-000749 NO

Before: Talbot, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants on the basis of governmental immunity and the open and obvious danger doctrine. We reverse.

On July 10, 1993, Plaintiff was injured when she twisted her ankle and fell while she was walking along the edge of a newly resurfaced highway under the jurisdiction of defendant Eaton County Road Commission (ECRC). Defendant Advanced Paving Company performed the resurfacing on June 11, 1993. Because gravel had not been laid on the shoulder after resurfacing, a drop-off of four to six inches existed between the surface of the edge of the roadway and the shoulder.[1]

The applicability of governmental immunity is a question of law reviewed de novo. *Cain v Lansing Housing Comm*, 235 Mich App 566; 599 NW2d 516. To survive a motion for summary disposition based on the defense of governmental immunity pursuant to MCR 2.116(C)(7), a plaintiff must allege facts warranting the application of an exception to governmental immunity. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997).

Governmental agencies enjoy statutory immunity under MCL 691.1407; MSA 3.996(107) from tort liability when engaged in governmental functions, unless one of the narrowly drawn statutory exceptions applies. *Mason v Wayne Co Bd of Comm'rs*, 447 Mich 130, 134; 523 NW2d 791 (1994), amended 451 Mich 1236 (1996). One of those exceptions is the highway exception, MCL 691.1402(1); MSA 3.996(102)(1), which provides that a governmental agency having jurisdiction over a highway has a duty to maintain the highway in a reasonably safe condition for public travel, and that

the agency may be held liable for damages caused by the breach of that duty. The duty, however, "extends only to the improved portion of the highway designed for vehicular travel . . . ." *Id*. The liability of county road commissions is similarly set forth in MCL 224.21(2); MSA 9.121(2), and that liability is also limited to the improved portion of the highway designed for vehicular travel.

Defendant ECRC argues that its duty did not extend to plaintiff because she was a pedestrian at the time of her injury. However, our Supreme Court has held that pedestrians may bring actions under the highway exception if their injuries are caused by a defect on the improved portion of the highway. *Suttles v Dep't of Transportation*, 457 Mich 635, 645, 652, 654-655, 661; 578 NW2d 295 (1998). Despite their four separate opinions, all members of the Court agreed that the focal point of an analysis under the highway exception was not the status of the person injured as either a pedestrian or a motorist, but rather whether the defect existed on or the injury occurred on the improved portion of the highway. *Id*. at 649, 654-655, 657. The shoulder of a highway is part of the improved portion of the highway designed for vehicular travel. *Soule v Macomb Co Bd of Rd Comm'rs*, 196 Mich App 235, 237; 492 NW2d 783 (1992); *Gregg v State Hwy Dep't*, 435 Mich 307, 313-314; 458 NW2d 619 (1990). Here, plaintiff alleged that she fell while walking along the edge between the surface of the highway and the shoulder, and that she fell because of a defect in the shoulder. Plaintiff's claim thus falls within the highway exception;[2] consequently, the trial court erred in granting summary disposition to defendant ECRC on the basis of governmental immunity.

Defendant ECRC also argues that it is not liable to plaintiff because plaintiff failed to serve written notice of the injury and the defect on defendant ECRC within 120 days of her injury, as required by MCL 691.1404(1); MSA 3.996(104)(1). Although MCL 224.21; MSA 9.121 provides that a sixty-day notice requirement applies to county road commissions, this provision is unconstitutional under an equal protection analysis. The 120-day notice requirement applies to county road commissions. *Brown v Manistee Co Rd Comm*, 452 Mich 354, 358-364; 550 NW2d 215 (1996).

Although plaintiff failed to give notice within the 120-day period, plaintiff is not barred from recovery unless defendant ECRC demonstrated actual prejudice from the lack of notice. *Brown, supra* at 366, reaffirming *Hobbs v Dep't of State Hwys*, 398 Mich 90, 96; 247 NW2d 754 (1976). In *Brown*, the plaintiff motorcyclist was injured when he lost control while trying to avoid a pothole in the road. The Court held that the defendant road commission failed to demonstrate actual prejudice from the plaintiff's failure to serve notice within the 120-day period because the road had been repaved before the notice period expired. *Id*. at 357, 368-369. Similarly, the alleged defect in this case, no gravel on the shoulder creating a drop-off between the surface of the road and the shoulder, was corrected before the expiration of the 120-day period. Therefore, defendant ECRC cannot demonstrate actual prejudice, and plaintiff is not barred from recovery by her failure to comply with the notice requirement. *Brown, supra* at 368-369.

The trial court also granted summary disposition to defendants on the basis of the open and obvious danger doctrine. We conclude that this doctrine was inapplicable to plaintiff's action against defendant ECRC and the trial court therefore erred in granting summary disposition on this basis.

The open and obvious danger doctrine, a defense that shields the defendant from liability where the plaintiff should have discovered the condition and realized the danger absent an unreasonable risk of harm, does not apply to claims where liability is premised on a statutory duty to maintain and repair a roadway. *Haas v Ionia*, 214 Mich App 361, 364; 543 NW2d 21 (1995);[3] *Walker v Flint*, 213 Mich App 18, 23-24; 539 NW2d 535 (1995). Accordingly, defendant ECRC cannot escape liability by asserting that plaintiff saw the uneven roadway and could have prevented her fall. "However, the city may argue that the openness and obviousness of the danger establishes comparative negligence on plaintiff's part." *Haas, supra* at 364. The trial court therefore erred in granting summary disposition to defendant ECRC on this basis.

Defendant Advanced Paving, on the other hand, did not perform the roadwork under any statutory duty to maintain and repair the road. It acted pursuant to contract with defendant ECRC. Plaintiff alleged that she was injured by the negligence of defendant Advanced Paving in performing its contractual duties of resurfacing the highway. We agree that defendant Advanced Paving owed a common-law duty to perform its contractual obligations with ordinary care, and that duty extended to anyone who might foreseeably be injured by the negligent performance of those contractual obligations. *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703-707-708; 532 NW2d 186 (1995). Plaintiff fails, however, to cite authority for the proposition that the contractor performing road work for a county road commission either (1) stands in the shoes of the road commission for purposes of liability or (2) is unable to assert the open and obvious defense in these circumstances. Although plaintiff had earlier in the evening noticed a "lip between the paved surface of the road and the shoulder" at one spot in the roadway, she also averred that she neither walked nor drove by the precise area where she fell. In view of that testimony and other evidence on that issue, it is apparent that a genuine issue of fact exists as to whether the drop off at the site where plaintiff fell was open and obvious.

Similarly, a genuine issue of material fact also exists that precludes summary disposition on the issue of whether despite the open and obvious nature of the road's edge, did the drop off on the roadway still present an unreasonable risk of harm. Accordingly, the trial court erred in granting summary disposition to defendant Advanced Paving on the basis of the open and obvious danger doctrine

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[1] Plaintiff attached an exhibit to its appellate brief establishing that on June 23, 1993, defendant ECRC received a telephone call from a gentleman complaining that a six inch drop off existed where the new blacktop was laid along M-99, the site of plaintiff's accident.

[2] We are cognizant that "the immediately preceding discussion should not be interpreted to mean the defendant is automatically liable to the plaintiff even if it is found that she was injured on the improved

portion of the highway designed for vehicular travel. Plaintiff must still demonstrate the requisite elements of a negligence cause of action. If on remand the trial court determines that the plaintiff has sufficiently pleaded a cause of action so as to avoid governmental immunity, the existence of a duty owed to plaintiff by defendant has been established. Plaintiff must then prove defendant breached that duty, and that the breach was the proximate and factual cause of her injury." *Suttles*, *supra* at 653 (Mallett, C.J.).

[3] "If the open and obvious danger rule applied, then any governmental agency with the duty to maintain a highway could simply post a sign announcing 'Defective Highway Ahead—Travel at Your Own Risk' and avoid the statutory obligation to keep its highways in good repair so as to be reasonably safe for public travel. Alternatively, a governmental agency could meet its statutory duty merely by allowing the roads and sidewalks to deteriorate until their appearance made any danger apparent to the public. Thus, absolving the city of liability in this situation would be tantamount to allowing the open and obvious danger rule to swallow the statutory duty to maintain highways . . . in good repair." *Id.* at 363.